

STATE OF MICHIGAN
COURT OF APPEALS

UNPUBLISHED

July 21, 2011

In the Matter of B. D. WALLS, Minor.

No. 302253

Kent Circuit Court

Family Division

LC No. 09-053065-NA

Before: SAWYER, P.J., and WHITBECK and OWENS, JJ.

PER CURIAM.

Respondent appeals of right from the trial court order terminating his parental rights to the minor child pursuant to MCL 712A.19b(3)(c)(i) and (g). The parental rights of the child's mother were also terminated, but she is not participating in this appeal. We affirm.

This Court reviews the trial court's findings of fact in termination proceedings for clear error. MCR 3.977(K); *In re Sours*, 459 Mich 624, 633; 593 NW2d 520 (1999); *In re Gazella*, 264 Mich App 668, 672; 692 NW2d 708 (2005). "A finding of fact is clearly erroneous if the reviewing court has a definite and firm conviction that a mistake has been committed" *In re BZ*, 264 Mich App 286, 296; 690 NW2d 505 (2004).

The minor child was removed from his mother's custody shortly after her birth. Both parents pleaded to allegations in the petition. The conditions that led to adjudication with regard to respondent were his significant criminal history and lack of income. At the time of adjudication, respondent was on supervised release from a federal conviction for distribution of drugs. Respondent was involved in an intensive Accelerated Reentry Program through his parole and received many services through this program. Rather than duplicate the services and overwhelm respondent, petitioner stayed in direct contact with respondent's parole officer to monitor his progress on the conditions of his parole. Petitioner was initially supportive of moving toward reunification of the minor child with respondent. The trial court was concerned with respondent's violent criminal history but gave petitioner the option to allow unsupervised visits, overnights, and placement with respondent if it was determined that this was appropriate. For the first few months, respondent was mostly compliant with his parent agency agreement. He then tested positive for marijuana on a hair follicle test; although screens before and after this test were negative and respondent complied with a new referral for substance abuse intake and evaluation. During the first seven months of the proceedings, respondent was also appropriate and nurturing during visits with the minor child. He then was incarcerated for failing to pay child support for another child and violating his parole. He was incarcerated for approximately seven months, during which time he did not see the minor child.

Throughout the proceedings, an order for no contact between respondent and the child's mother was in place because there had been incidents of domestic violence between them. This was reiterated often during the various hearings. Respondent, however, did not comply. He allowed the child's mother to live in his apartment while he was incarcerated, visited the mother when she was in jail, posted a picture of the mother and himself hugging on Facebook, did not delete her from his email contacts until the caseworker discovered that she was included in mass emails of photos of the minor child, and continued contact with her parents and brother. Respondent denied this contact until a recording of his visit to the child's mother in jail was admitted into evidence.

The conditions of adjudication continued to exist at the time of the termination hearing. At the hearing, respondent reported that he was not employed, that he had subsidized housing and was not required to pay rent if he did not have any income, and that he received food stamps. He admitted that he was aware of drug use in the apartment complex he lived in but did not want to move because he did not want to lose the subsidized housing. Respondent had just been released from seven months' incarceration in federal prison, and he did not have a source of income. Although respondent's efforts were encouraging at first, he was unable to maintain any stability and avoid incarceration. By his own admission, respondent had spent 11 to 12 years of his life incarcerated in either prison or jail. He continued to engage in activities that resulted in his incarceration and inability to provide care and custody of the minor child. At the time of the termination hearing, the minor child was 15 months old and had been in the care of the court since she was born. The trial court did not clearly err when it found that the conditions of adjudication continued to exist, respondent had failed to provide proper care and custody for the minor child, and there was no reasonable likelihood that he would be able to rectify the conditions of adjudication and provide proper care and custody within a reasonable amount of time.

The trial court did not solely rely on respondent's incarceration as a basis for terminating respondent's parental rights in violation of *In re Mason*, 486 Mich 142, 160, 782 NW2d 747 (2010), as respondent contends. Respondent's incarceration was one factor, but the court also considered respondent's failure to abide by the no-contact order, failure to admit having contact with the child's mother, his positive hair follicle test, and his lack of resources to care for the minor child. Respondent argues that the minor child should have been placed with him from the beginning. However, at that time the trial court expressed concerns about respondent's violent criminal history and wanted further information, and petitioner wanted to see respondent being consistent and stable before placing the minor child with him. Respondent was unable to maintain consistency and stability throughout the proceedings.

Respondent argues that the trial court violated *Mason* because he was not allowed to participate in the permanency planning hearing by telephone and because petitioner did not provide services to him while he was incarcerated. The trial court did not clearly err. MCR 2.004 requires the court and the petitioner to arrange for telephonic communication with parents incarcerated under the jurisdiction of the Department of Corrections whose children are the subject of child protective actions. MCR 2.004(A) to (C). The court must consider "the scheduling and nature of future proceedings, to the extent practicable, and the manner in which the incarcerated party may participate." MCR 2.004(E)(5).

When the trial court set the date for the permanency planning hearing, respondent was present in court. He was, however, not present at the permanency planning hearing, having been incarcerated in a federal prison in Indiana, outside Department of Corrections' jurisdiction. Respondent's attorney moved to adjourn the permanency planning hearing and requested that a record be made of efforts to obtain respondent's participation. The trial court denied the motion for adjournment, pointing to the safety of the young minor child and her need for permanency, and stated efforts would be made to obtain respondent's participation for the next hearing date. The caseworker testified at the permanency planning hearing regarding respondent's incarceration in a federal prison and the efforts made to contact him during his incarceration. Respondent's federal parole officer had advised petitioner that respondent was in solitary confinement and unable to receive mail during that period. At the end of the permanency planning hearing, the trial court determined that return of the child to either parent would create a substantial risk of harm and that it was in the child's best interests to initiate termination proceedings against both parents. The court set a date for the termination hearing. On that date, respondent's attorney moved to adjourn the termination hearing until respondent was released from prison in five weeks. The trial court adjourned the termination hearing so that respondent could attend in person.

Under the circumstances of respondent's incarceration in federal prison in another state, as well as his solitary confinement, it was not practicable for the trial court to require that respondent be given the opportunity to participate in the permanency planning hearing by telephone. Respondent's attorney was present at the permanency planning hearing, cross-examined the witness, and argued on respondent's behalf. The next hearing date, which was the hearing on the termination petition, was adjourned so that respondent could participate in person upon his release from prison. Considering the young minor child's need for permanency, the trial court did not clearly err in refusing to delay the permanency planning hearing under these circumstances. Respondent participated in every other phase of the review process and the subsequent termination hearing, and he was represented by counsel at the permanency planning hearing.

Respondent also argues that petitioner was required to provide services to respondent while he was incarcerated. In this case, respondent was extensively involved in case planning and had a clear understanding of all of the conditions that he was required to meet before the minor child could be placed with him. The most significant conditions were respondent's ability to abide by the no contact order with regard to the child's mother and his ability to maintain a stable life. Contrary to respondent's argument on appeal, petitioner and the trial court did evaluate respondent as a future placement and provided services. The trial court did not clearly err when it found that reasonable efforts were made to reunify respondent with the minor child.

Affirmed.

/s/ David H. Sawyer
/s/ William C. Whitbeck
/s/ Donald S. Owens